Air Transit, Inc. and Anthony Herndon and James J. Edge. Case 5-CA-10368

June 1, 1981

DECISION AND ORDER

Upon a charge filed on December 19, 1979, by the Charging Parties, individuals, and duly served on Air Transit, Inc. (Respondent herein), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint and notice of hearing on June 6, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that in August and November 1978, Respondent by and through the acts of its agents, Jack Shinberg and Ritchie Gaylen, violated Section 8(a)(1) of the Act by threatening employees because they had engaged in protected concerted activities. Respondent filed an answer and an amended answer admitting in part, and denying in part, the allegations of the complaint.

Thereafter, on January 27, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. On January 29, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a brief in opposition to the General Counsel's Motion for Summary Judgment.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

The complaint alleges in pertinent part that, in August and November 1978, Respondent by and through the conduct of its agents Jack Shinberg and Ritchie Gaylen violated Section 8(a)(1) of the Act by (1) threatening employees because they gave testimony at a Board representation hearing; (2) threatening employees with unspecified actions because of their activities on behalf of a union; (3) threatening employees that they would need a union if they continued their organizing efforts on behalf of a union; and (4) threatening employees with discharge because of their efforts and activities in forming an employee association and their activities on behalf of a union. Respondent's

answer and amended answer admit the essential elements of the complaint; however, Respondent denies that it is an employer within the meaning of the Act, and it denies any violation of the Act. As an affirmative defense, Respondent contends that the individuals alleged to be employees of Respondent, taxi drivers working at Respondent's Dulles Airport facility, are independent contractors, not employees, and therefore are not subject to the Act. In his motion for Summary Judgment, the General Counsel contends that pursuant to a petition filed by the Communication Workers of America, AFL-CIO (the Union), the Board, on April 21, 1980, issued a Decision on Review and Direction of Election in a unit of all taxi drivers working at Respondent's Dulles Airport taxi stand. 1 Notwithstanding Respondent's contentions, the General Counsel submits that the Board properly found, in the representation case, that the taxi drivers involved herein were employees within the meaning of the Act and that Respondent has failed to present any evidence establishing that the Board erred in finding those individuals to be employees within the meaning of the Act. Accordingly, the General Counsel submits that the Board should grant the Motion for Summary Judgment. In its opposition to the General Counsel's Motion for Summary Judgment, Respondent contends that the evidence presented in the earlier representation case demonstrates that the taxi drivers are independent contractors and that Respondent is not an employer within the meaning of the Act. Respondent further contends that the General Counsel's Motion for Summary Judgment should be denied and that the allegations of the complaint should be dismissed. We find no issues remain requiring a hearing and, as discussed below, we grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Virginia corporation, with its principal office in Arlington, Virginia, is engaged in the taxicab business. During the preceding 12 months, a representative period, Respondent received gross revenues in excess of \$500,000 from its operations. During the same period, Respondent purchased and received, in interstate commerce, materials and supplies valued in excess of \$50,000

¹ 248 NLRB 1302. Subsequently, an election was held wherein a majority of the participating employees voted against representation by the Union, and thereafter, the Regional Director issued a Certification of Results of Election.

directly from points located outside the Commonwealth of Virginia. Accordingly, we find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Communication Workers of America, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

As noted above, the General Counsel contends that Respondent has violated Section 8(a)(1) of the Act by threatening its employees because of their involvement in protected concerted activities. Contrary to the General Counsel's position, Respondent claims that it did not violate the Act because the individuals threatened by Respondent's agents are independent contractors and are not protected by the Act. Respondent contends that in directing an election among taxi drivers working at its Dulles Airport taxi stand the Board erred in finding that those taxi drivers were employees within the meaning of the Act and that therefore the complaint allegations should be dismissed.

In a case such as the instant case, which involves independent violations of the Act that are unrelated to a prior representation case, the findings in that prior representation case are subject to challenge and may be litigated.2 Subject of course, to reconsideration and to any additional evidence adduced in the unfair labor practice case, the Board may accord a certain "persuasive relevance, a kind of 'administrative comity" to the prior representation case findings.³ In the instant case, however, Respondent does not offer any additional evidence to support its contention, it merely contends that the Board erred in the earlier representation case.4 Accordingly, we have carefully considered our prior decision and, based on the entire record in this case, we reaffirm our previous findings in 248 NLRB 1302 that Respondent's taxi drivers are employees within the meaning of the Act and are entitled to the full protection of the Act. We find, therefore, that Respondent violated Section 8(a)(1) of the Act by threatening its employees because of their involvement in protected concerted activities.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

- 1. Air Transit, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. Communication Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By threatening employees because they gave testimony in a Board representation case, by threatening employees with unspecified action because of their activities on behalf of the Union, by threatening employees that they would need the Union if they continued their organizing efforts on behalf of the Union, and by threatening employees with discharge because of their efforts and activities in forming an employee association and their activities on behalf of the Union, Respondent violated Section 8(a)(1) of the Act.
- 4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent,

² In contrast, representation case findings in a "related" subsequent unfair labor practice proceeding (i.e., Sec. 8(a)(5) case based on certification in a representation proceeding) are not subject to relitigation. Serv. U-Stores, Inc., 234 NLRB 1143, 1144 (1978), Chairman Fanning and Member Jenkins dissenting on other grounds.

³ Ibid.

⁴ Member Zimmerman relies on the Board's prior determination that the Employer's drivers were employees within the meaning of the Act and upon Respondent's failure to introduce any additional evidence warranting an alternative finding. Although the Board could, without violating its rules, reverse that determination, Member Zimmerman considers the policies and principles of stare decisis as militating strongly against such a course, particularly in the absence of new evidence or changed circumstances. Cf. Bravos Oldsmobile, 254 NLRB No. 135 (1981) (concurrence of Member Zimmerman).

Air Transit, Inc., Arlington, Virginia, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Threatening employees because they gave testimony at a Board representation hearing, threatening employees with unspecified actions because of their activities on behalf of the Union, threatening employees that they would need the Union if they continued their organizing efforts on behalf of the Union, and threatening employees with discharge because of their efforts and activities in forming an employee association and their activities on behalf of the Union.
- (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.
- 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:
- (a) Post at its Dulles Airport facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.
- (c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT threaten employees because they have given testimony at a National Labor Relations Board hearing.

WE WILL NOT threaten employees with unspecified action because of their activities on behalf of the Communication Workers of America, AFL-CIO, or any other union.

WE WILL NOT threaten employees that they would need a union if they continue their organizing efforts on behalf of the Communication Workers of America, AFL-CIO, or any other union.

WE WILL NOT threaten employees with discharge because of their efforts and activities in forming an employee association and their activities on behalf of the Communication Workers of America, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them in Section 7 of the National Labor Relations Act.

AIR TRANSIT, INC.

^b In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."